

118 Box 47 - JGR/Recess Appointments (5) – Roberts, John G.:
Files SERIES I: Subject File

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

January 18, 1985

NOMINATION SENT TO THE SECRETARY OF THE SENATE:

John A. Bohn, Jr., of Virginia, to be First Vice President of the Export-Import Bank of the United States for a term expiring January 20, 1989. (Reappointment)

w/ other stuff in
new not file.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

January 22, 1985

The President yesterday recess appointed the following individuals:

JOHN A. BOHN, JR., to be First Vice President of the Export-Import Bank of the United States for a term expiring January 20, 1989. This is a reappointment.

RICHARD H. HUGHES, to be a Member of the Board of Directors of the Export-Import Bank of the United States for a term expiring January 20, 1987. This is a reappointment.

#

Memorandum



Subject

Recess Appointments to the
Export Import Bank.

Date

JAN 28 1985

To
FILES

From
NAME: Herman Marcuse
OFFICE SYMBOL: OLC

STATEMENT:

In the afternoon of Friday, January 18, 1985, Mr. John Roberts of the Office of the Counsel to the President presented a question about the President's power to make recess appointments to the Board of Directors of the Export Import Bank. He advised me that the terms of two of the directors would expire on January 20, 1985, and inquired whether the President could make recess appointments to the Board in the morning of January 21, 1985, before the Senate would reconvene from its recess at noon. I asked Mr. Roberts when the recess began, and he stated that it began on January 3.1/

I indicated to him that the recess period of 18 days was extremely short; moreover, while we had opined that the President's power to make recess appointments lasted until the Senate actually reconvened -- hence that, if the Senate should reconvene at noon, the President could make recess appointments in the forenoon -- the making of recess appointments so close to the end of the recess did present problems, indeed this was one of the reasons for the voluntary dismissal of the quo warranto proceedings brought by the Government against a board member of the Corporation for Public Broadcasting. I therefore told Mr. Roberts that in view of the close and delicate nature of the question I would have to discuss it with DAAG Simms. Mr. Roberts indicated that our reply to this inquiry was rather urgent.

I discussed the information I had received from Mr. Roberts with Mr. Tarr and Mr. Simms. Both felt that an 18 day recess was rather short. Mr. Simms suggested that the difficulty

1/ As shown in the Addendum, we discovered, after having given our advice to Mr. Roberts, that the recess had begun on January 7, 1985. The time limitations given to us prevented us from checking independently the time of the adjournment of the Senate.

of making recess appointments in the morning of January 21st might be avoided by having the directors whose terms expire on January 20th resign immediately so that the President could make a recess appointment on January 19th or 20th. In any event, they recommended that the President should submit nominations as soon as possible.

I then called Mr. Roberts and gave him the substance of my discussion with Mr. Tarr and Mr. Simms. With respect to resignation of the directors so that the President could make recess appointments prior to the 21st, Mr. Roberts indicated that in view of the obscure language of 12 U.S.C. § 635a(c)(8) 2/

2/ Section 635a(c)(8) provides:

(8)(A). The terms of the directors, including the President and the First Vice President of the Bank, appointed under this section shall be four years, except that --

(i) during their terms of office, the directors shall serve at the pleasure of the President of the United States;

(ii) the term of any director appointed after the date of enactment of this paragraph to serve before January 20, 1985, shall expire on January 20, 1985;

(iii) of the directors first appointed to serve beginning on or after January 21, 1985, two directors (other than the President and First Vice President of the Bank) shall be appointed for terms of two years, as designated by the President of the United States at the time of their appointment; and

(iv) any director first appointed to serve for a term beginning on any date after January 21, 1985, shall serve only for the remainder of the period for which such director would have been appointed if such director's term had begun on January 21, 1985. If such term would have expired before the date on which such director's term actually begins, the term of such director shall be the four-year period, or remainder thereof, as if such director had been preceded by a director whose term had begun on January 21, 1985.

there was a strong possibility that any appointment prior to January 21st would expire on January 20th. A recess appointment prior to January 21st, therefore presented at least as much of a risk as a recess appointment in the forenoon of the day on which the Senate reconvenes. As to the recommendation to submit nominations in the very near future, Mr. Roberts advised me that the nomination of one of the prospective recess appointees already had been reported to the Senate and that the appropriate Committee had indicated that there appeared to be no objection to the appointment, but that confirmation might take a while. On the other hand, the Bank had warned the White House that extended vacancies on its Board would cause serious problems.

I advised Mr. Roberts that, in the view of this Office, these recess appointments should be avoided, if at all feasible; but, on the other hand, what had to be done, had to be done, and we could not say that they would be constitutionally invalid as a matter of law.

Addendum

In view of the urgency of the matter, I had to rely on Mr. Roberts' statement that the recess of the Senate lasted from January 3 to January 21, i.e., for 18 days. On January 22nd, while preparing this memorandum, I discovered that the recess of the Senate lasted only from January 7 to January 21, i.e., for 14 days. While 14 days is an extremely short period, it is felt that Attorney General Daugherty's opinion of August 21, 1921, 33 Op. Att'y Gen. 20, 24-25 (1921) would support the conclusion that the President has the power to make an appointment during a recess of the Senate lasting only fourteen days. See, Appendix.

The White House subsequently has advised us that the proposed recess appointments had been made on January 21, 1985, at 9:30 a.m.

Appendix

The opinion of Attorney General Daugherty of August 21, 1921, 33 Op. Att'y Gen. 20, 24-25 (1921) states in pertinent part:

"I now pass to the most difficult question of all. In one sense its discussion at the present time is unnecessary, but I nevertheless deem an expression of my views advisable so as to avoid any misconception as to the scope of this opinion. The inquiry at once presents itself: If the President is empowered to make recess appointments during the present adjournment does it not necessarily follow that, the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term "recess" must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution. In the very nature of things the line of demarcation can not be accurately drawn. To paraphrase the very language of the Senate Judiciary Committee Report [S. Rep. No. 4389, 58th Cong., 3d Sess. (1905)], the essential inquiry, it seems to me, is this: Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?

"In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible

for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor of the validity of whatever action he may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review."

EXPORT-IMPORT BANK OF : BOARD OF : :
 THE UNITED STATES : DIRECTORS : INDEPENDENT : TERM: 4 yrs (see authority) : (NOT
 : MBRS: 5 (3 by President) : HOLDOVERS)
 : (BI-PARTISAN)

NAME	State	Term Expires	Nominated	Confirmed	Commissioned	Vice
✓YONGE, James Ernest (D)	Fla.		9/21/81	10/1/82	10/4/82	TdeSPhalle, rsgnd.
HELDRIDGE, Richard W. (R)	Calif.		12/8/81	8/4/82	8/11/82	MWKahliff, rsgng.
(MWKahliff retired from Government service, COB, 8/10/82, per the Bank.)						
RODRIGUEZ, Rita M. (I)	Mass.		9/9/82	10/1/82	10/4/82	DESTingel, rsgnd.
(JEYonge rsgnd. 6/1/84, eff. 7/1/84; acc. 6/18/84, eff. 7/1/84)						
(small business)						
✓HUGHES, Richard H. (D)	Ok.	1/20/85	10/3/84	NOT CONFIRMED		JEYonge, rsgnd.
(small business)						
HUGHES, Richard H. (D)	Ok.	1/20/85	RECESS	-----	12/21/84	JEYonge, rsgnd.
(small business)						
HUGHES, Richard H. (D)	Ok.	1/20/85	1/3/85			Recess
(small business)						
HUGHES, Richard H. (D)	Ok.	1/20/87	1/9/85			Reappointment

EXPORT-IMPORT BANK OF THE UNITED STATES,
FIRST VICE PRESIDENT OF THE

Independent

AUTHORITY: 12 U.S.C. 635a(b) & 635f
P.L. 98-181, Sec. 614, November 30, 1983 (establishes term)

METHOD: Nominated to the Senate

TERM: FOUR YEARS, except that during term of office, shall serve at the pleasure of the President. The term of anyone appointed after November 30, 1983, to serve before January 20, 1985, shall expire on January 20, 1985. Anyone first appointed to serve for a term beginning on any date after January 21, 1985, shall serve only for the remainder of the period for which such person would have been appointed if such person's term had begun on January 21, 1985. If such term would have expired before the date on which such person's term actually begins, the term of such person shall be the four-year period, or remainder thereof, as if such person had been preceded by one whose term had begun on January 21, 1985.

Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the person whom such person succeeds.
(NOT HOLDOVER)

Anyone whose term has expired may be reappointed.

SALARY: Level IV (5 U.S.C. 5315)

NOTE: Shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank.

TERMINATION: Shall continue to function until September 30, 1986 - P.L. 98-181, Sec 611, 98 Stat. 11/30/83.